

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1726

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MEREDITH CORPORATION,
an Iowa corporation,

74 1726

Plaintiff-Appellant,

- against -

HARPER & ROW, PUBLISHERS, INC.;
PAUL HENRY MUSSEN; JOHN JANEWAY
CONGER; and JEROME KAGAN,

Defendants-Appellees,

BRIAN SUTTON-SMITH, an individual,
and PRENTICE-HALL, INC., a Delaware
corporation,

Additional Defendants on
Counterclaim-Appellants.

-----x

APPELLANTS' REPLY BRIEF



HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for additional defendant-
appellant Brian Sutton-Smith

MOLINARE, ALLEGRETTI, NEWITT &
WITCOFF
Attorneys for plaintiff-appellant
Meredith Corporation

Of Counsel:

Marshall C. Berger
George B. Newitt
George P. McAndrews
Wayne Carson

WILLIAM J. DALY, JR., ESQ.
Attorney for additional defendant-
appellant Prentice-Hall, Inc.

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APPELLANTS' REPLY BRIEF

This brief is submitted by appellants in reply to
the contentions of appellees' brief herein.

I.

APPELLEES' VERSION OF THE FACTS

The basic undertone of appellees' brief is that
the fact of infringement has been established and it is

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impossible to argue with that conclusion. But appellees' vehemens of language cannot wipe away either the proof of substantial independent research by appellants or the differences between the books. Thus for example on page 17 of their brief, appellees say that our "bold assertion that there are significant differences in organization and coverage between the books simply has no basis in the record". But this statement simply ignores the discussion of the differences in organization and coverage described at length on pages 14 and 15 of our original brief. Similarly, appellees' brief assumes that its chart of parallels is indisputable, again ignoring the detailed showing at pages 15 through 17 of our original brief. Appellees' one attempt to deal with this analysis at page 23 of their brief is the unexplained assertion that "the insertion of one sentence...in one of the parallels surely does not disprove the copying of that passage". (See appellants' original brief, page 15.) This contention completely misses the point. The expression of a thought not found in MCK indicates that appellants must have gone to a source other than MCK to write that passage. Thus that parallel proves research rather than plagiarism.

Appellees' attempts to prove copyright infringement

by their own ipse dixit rests in a large part on the purported resemblances between outlines of certain MCK chapters by Julie Small, a Meredith editor, and the outlines submitted to the free-lance writer also prepared by Miss Small. At page 16 of their brief, appellees assert this was a systematic procedure of Meredith "under Sutton-Smith's guidance". But at page 42, they complain that only five (5) such outlines were produced by Meredith. Appellees never cite any authority for these statements which is understandable in view of the total absence of any proof that Professor Sutton-Smith even knew about the Mussen outlines, let alone guided their production. As we pointed out at pages 20 - 21 of our original brief, these purported similarities between the outlines prove nothing. Thus, one of the outlines supplied to the writer supposed to have been copied from an outline of a Mussen chapter is chapter two (2) of BSS dealing with the subject of learning and development. But appellees claim only five (5) purported parallels for this chapter (parallels 6 through 10), one of which is not even from the chapter supposed to have been copied (parallel 8). We can brush aside the appellees' contention that they were conservative in making their chart of parallels and we can assume that if

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they had more arguable parallels for chapter two (2), they would have put them in. Hence, appellees' own compilation refutes their contention. It is, of course, further refuted by the detailed references to other works, as well as researcher's notes, appearing throughout the outline. In summary, appellees have not established the fact of infringement necessary for the grant of a preliminary injunction.

II.

THE APPLICABLE LAW OF COPYRIGHT

Essentially, appellees try to distinguish all of the prior cases by saying that somehow the field of child psychology is different from economics or nursing or electronics or American history or any of the other subjects before the courts in other copyright cases. Patently, such well established precedents cannot be so easily disposed of. The fact that the cram book in Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (2nd Cir. 1938) did not have, as we pointed out at page 29 of our original brief, "the dignity, the sophistication and complexity of the works in question here" does not mean that the rules enunciated by this Court in that decision can be ignored. Nor can the

case be distinguished by appellees' own ipse dixit that there was no independent research here in light of the contrary facts in the record before the Court.

Appellees similarly try to distinguish Rosemont Enterprises, Inc. v. Random House, 366 F. 2d 303 (2nd Cir. 1966) by emphasizing the repressive activities of Howard Hughes who apparently controlled the plaintiff therein as documented in the concurring opinion of Chief Judge Lumbard. Such an analysis ignores the last sentence of Judge Lumbard's concurring opinion:

"Of course, I agree with the other reasons set forth in Judge Moore's opinion to support the conclusion that the district court should not have restrained the publication of the biography." At page 313 (emphasis supplied)

Judge Moore's opinion sets forth the reasons apart from Howard Hughes' idiosyncrasies why the conclusion of the district court therein was wrong. As we pointed out in our original brief, such reasoning is applicable here.

A case principally relied upon by appellees, Higgins v. Baker, 309 F. Supp. 635 (S.D.N.Y. 1970), highlights a conspicuous failure of appellees' brief--the failure to discuss the quantum of proof necessary to obtain a pre-

liminary injunction in general and in a case involving a book protected by the First Amendment in particular. The Higgins case denied a motion for summary judgment brought by a defendant. In so doing, the Court emphasized the unsatisfactoriness of disposing of a difficult question of copyright infringement and fair use by "trial by affidavit" (at 637). The Higgins case was subsequently cited in McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971) as grounds for denial of the preliminary injunction there. Yet here, appellees are seeking to justify a preliminary injunction in a copyright case involving a book obtained by a "trial by affidavit".

III.

THE BALANCING OF THE EQUITIES

Appellees' discussion of the propriety of injunctive relief is most significant for its omissions. They do not even mention the irreparable injury established by their own moving papers that the preliminary injunction has inflicted upon appellants. Likewise, they have not come to grips with our analysis of their excuses for their delay in seeking injunctive relief contained at pages 39 through 40

of our original brief. Instead, they merely state that we have not established any prejudice in their delay. Such an assertion is astonishing in view of the fact that the delay has caused injunctive relief to be granted at what appellees' own papers establish is the height of the textbook selling season and placing appellants in the unenviable position of having to appeal a grant of a preliminary injunction at the same time they are trying the case on the merits. Thus appellees' brief fails to establish why the grant of the preliminary injunction below is justified by the balancing of the equities.

CONCLUSION

For all the reasons stated herein and in our original brief, we respectfully submit that the preliminary injunction of the Court below be reversed because it is based upon mistakes of law, improper credibility findings and constitutes an abuse of discretion.

HAHN, HESSEN, MARGOLIS & RYAN
Attorneys for additional defendant-
appellant Brian Sutton-Smith

MOLINARE, ALLEGRETTI, NEWITT
& WITCOFF
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Attorney for additional defendant-
appellant Prentice-Hall, Inc.

Of Counsel:

Marshall C. Berger
George B. Newitt
George P. McAndrews
Wayne Carson

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Attorneys for Appellees

*Lukeman, Carson, Beckwith
by James Lukeman, attorney
a member of the bar
and*

Edward H. Muller, Jr.

Attorney for Appellant